No. 94-7

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
NORTH BRANCH ENERGY PARTNERS, L.P. and
MON VALLEY ENERGY CORPORATION,
Respondents,

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

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BRIEF IN OPPOSITION OF RESPONDENT, THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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36 pp

QUESTIONS PRESENTED

Pursuant to section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §824 a-3, the Federal Energy Regulatory Commission (FERC) promulgated rules requiring electric utilities to buy power from entities described in the statute as "qualifying facilities" and requiring that state regulatory commissions carry out the rules. At the request of petitioners, the Pennsylvania Public Utility Commission (PUC) reviewed a contract between a qualifying facility and a utility and approved it, but due to petitioners' litigation, the original contract due dates could not be met. Thus the PUC approved modifications to the due dates and updating of the payment schedule. The questions presented are:

1. Whether petitioners, having failed to petition for certiorari and having failed even to attempt preservation of any issues related to contract modifications in the case on remand, may now seek review of a long-ago final judgment?

2. Whether PURPA and the FERC regulations allow the PUC to extend contract milestone dates and update capacity payments, when the contractual relationship intended by PURPA would otherwise have terminated due to litigation delays caused by the petitioners?

3. When petitioners Armco/Allegheny previously argued PURPA requires an "avoided cost" calculation made on the date of contract signing—the position adopted by the Pennsylvania Commonwealth Court—and petitioner West Penn originally argued for avoided cost calculations made prior to contract signing, but both petitioners argue a different position in the petition for certiorari, should the Commonwealth Court decision be disturbed?

TABLE OF CONTENTS

Page

Questions Presented i

Opinions Below. 1

Jurisdiction. 3

Statement of the Case 4

A. Introduction and Legal Background 4

B. The Agreement and the PUC Proceedings. 7

C. The Pennsylvania Commonwealth Court Decision *(Burgettstown I)* 9

D. The Pennsylvania Supreme Court Decision in *Milesburg II* 11

E. *Burgettstown II* 11

Reasons for Denying the Writ. 13

I. Petitioners failed to seek timely review of the final decision on contract modification and have failed even to attempt preservation of any such issues 16

II. Because the FERC regulations allow flexibility to the states to implement those regulations, Commonwealth Court correctly affirmed the PUC's decision on contract milestone dates and payment updates, thus there is no question worthy of this court's exercise of jurisdiction. . . . 20

III. The PUC held full evidentiary hearings, determining that rates under the contract were below full avoided costs and just and reasonable. Nothing in PURPA or the FERC regulations required recalculation of contract rates on the date of the PUC order 27

Conclusion 30

TABLE OF AUTHORITIES

CASES	Page
American Paper Institute v. American Electric Power Service Corp., 461 U.S. 402 (1983)	30
Armco Advanced Materials Corp. v. Pennsylvania Public Utility Commission., 135 Pa. Commonwealth Ct. 15, 579 A.2d 1337 (1990), *aff'd*____ Pa.____634 A.2d 207 (1993) *petition for cert. filed,* No. 93-1341 (February 22, 1994)	3
Armco Advanced Materials Corp. v. Pennsylvania Public Utility Commission, Nos. 2090 and 2097 C.D. 1989, filed September 7, 1990, *appeal denied,* No. 531 W.D. Allocatur Docket 1990	1
Armco Advanced Materials Corp. v. Pennsylvania Public Utility Commission, 157 Pa. Commonwealth Ct. 150, 629 A.2d 221 (1993), *review denied,* Nos. 457, 462, 577 and 596 W.D. Allocatur Docket 1993 (April 4, 1994)	3
Barasch v. Pennsylvania Public Utility Commission, 119 Pa. Commonwealth Ct. 81, 546 A.2d 1296 (1988), *appeal denied,* 523 Pa. 652, 567 A.2d 655 (1989)	1
Bates Fabrics, Inc. v. Public Utilities Commission, 447 A.2d 1211 (Me. 1982)	25
Benson v. Benson, 425 Pa. Superior Ct. 215, 624 A.2d 644 (1993) *appeal denied* 639 A.2d 22 (Pa. 1994)	17
California v. Taylor, 353 U.S. 553 (1957)	19
Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984)	29
City of Springfield v. Kibbe, 480 U.S. 257, *reh'g denied* 481 U.S. 1033 (1987)	19
Commonwealth v. Tick, Inc., 431 Pa. 420, 246 A.2d 424, 427 (1968)	18
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	16

TABLE OF AUTHORITIES

CASES	Page
Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989)	16
FERC v. Mississippi, 456 U.S. 742 (1982)	14
Hughes v. Pennsylvania State Police, 152 Pa. Commw. Ct. 409, 619 A.2d 390 (1992), *appeal denied,* 637 A.2d 293 (1993)	18
Ibn-Sadiika v. Riester, 380 Pa. Super. Ct. 397, 551 A.2d 1112 (1988)	19
Idaho Dept. of Employment v. Smith, 434 U.S. 100 (1977)	15
In Re Vicon Recovery Systems, 153 Vt. 539, 572 A.2d 1355 (Vt. 1990)	24
Lower Paxton Township, Board of Supervisors v. Okonieski, 153 Pa. Commw. Ct. 36, 620 A.2d 602 (1993)	19
McCormick v. Columbus Conveyer Co., 522 Pa. 520, 564 A.2d 907 (1989)	18
Petition of East Georgia Cogeneration, 158 Vt. 525, 614 A.2d 799 (Vt. 1992)	28
Public Utility Commission of Texas v. Gulf States Utilities Co., 809 S.W.2d 201 (Tex. 1991)	22
Robinson v. Robinson, 505 Pa. 226, 478 A.2d 800 (1984)	19
Ross v. Moffitt, 417 U.S. 600 (1974)	15
Singleton v. Waties, 420 Pa. Super. Ct. 184, 616 A.2d 644 (1992)	17
Smith v. Murray, 477 U.S. 527 (1986)	19
Spang & Co. v. USX Corp., 410 Pa. Superior Ct. 254, 599 A.2d 978, *appeal denied,* 611 A.2d 712 (Pa. 1991)	18
Wainwright v. Sykes, 433 U.S. 72, 86-87, *reh'g denied,* 434 U.S. 880 (1977)	19

TABLE OF AUTHORITIES

CASES — Page

Water Power Co., Inc. v. Pacificorp, 99 Or. App. 125, 781 P.2d 860 (1989), *rev. denied,* 309 Or. 291,787 P.2d 887 (1990), *cert. denied,* 498 U.S. 811 (1990). 24

Watt v. Alaska, 451 U.S. 259, 275 (1981). 15

West Penn Power Co. v. Pennsylvania Public Utility Commission, 150 Pa. Commonwealth Ct. 349, 615 A.2d 951 (1992) 29

STATUTES

16 U.S.C. §824 a-3. . . . . i, 2, 3, 4
16 U.S.C. §824 a-3(d) 4

28 U.S.C. §1257 3

66 Pa. C.S. §§331 and 335 2

REGULATIONS

18 C.F.R. §292.101(b)(6) 4
18 C.F.R. §§292.301-308 5
18 C.F.R. §292.301. . . . . 21, 23, 24, 26
18 C.F.R. §292.301(b) 5, 10, 20
18 C.F.R. §292.304(a)(1) 4
18 C.F.R. §292.304(b) 4, 30
18 C.F.R. §292.304(e) 30
18 C.F.R. §292.304(d)(2) 5, 6, 11, 26
18 C.F.R. §292.401 10
18 C.F.R. §292.401-403 14
18 C.F.R. §292.401(a) 14, 29

OTHER

45 *Fed. Reg.* 12217 (February 25, 1980). 5
45 *Fed. Reg.* 12226 (February 25, 1980). 30
45 *Fed. Reg.* (February 25, 1980) 4, 21

Pa. R.A.P. 302(a) 19

OPINIONS BELOW

The Pennsylvania Supreme Court declined to accept this case for review on November 19, 1991. 321a. That Court denied applications for reconsideration on February 3, 1992. 322a. The unreported decision of the Pennsylvania Commonwealth Court, affirming the decision of the PUC, therefore remains undisturbed. *Armco Advanced Materials Corp. v. Pennsylvania Public Utility Commission,* Nos. 2090 and 2097 C.D. 1989 (September 7, 1990), *appeal denied,* No. 531 W.D. Allocatur Docket 1990 (November 19, 1991) *(Burgettstown I),* 299a-320a. The PUC rendered its order approving milestone date extensions on September 21, 1989. 239a- 289a.

The PUC originally reviewed the contract between West Penn Power Co. (West Penn), an electric public utility, and North Branch Energy Partners, L.P. (North Branch) the developer of the Burgettstown Project, a cogeneration facility, and approved the contract by declaratory order. 67 Pa.P.U.C. 656, 47a-96a. The order held that rates were below avoided costs and that West Penn needed capacity. 82a-88a, 95a. Subsequently, in a similar case, the Pennsylvania Commonwealth Court determined that evidentiary hearings to consider contract approval would be proper. *Barasch v. Pennsylvania Public Utility Commission,* 119 Pa. Commonwealth Ct. 81, 546 A.2d 1296 (1988), *appeal denied,* 523 Pa. 652, 567 A.2d 655 (1989) *(Milesburg I).* Since parties had filed exceptions to the order approving the North Branch contract, the PUC considered that the *Milesburg I* holding could be applicable to all projects. Thus the contracts were consolidated for evidentiary hearings. 97a- 104a.

Petitioners Armco Advanced Materials Co. and Allegheny Ludlum Corp. (Armco/Allegheny) participated fully in those hearings, along with West Penn. During the proceedings, North Branch requested extension of various contract due dates or "milestones." An administrative law

judge (ALJ) rendered a 104-page recommended decision[1] on June 8, 1989. The ALJ held that North Branch was entitled to sell power to West Penn, at rates in the contract, in accord with the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §824 a-3. 116a-219a. The ALJ's decision addressed numerous questions, including whether any other claims of West Penn and Armco/Allegheny should be granted. He recommended that North Branch's extension request be denied. The PUC's order of September 29, 1989 (239a-289a), adopted the ALJ's recommendation on virtually all substantive issues, but reversed the recommendation as to contract due dates for Milesburg Energy Inc. (Milesburg) and North Branch, approving the extensions. 272a-284a.

West Penn appealed insofar as modifications to contracts for the Milesburg and the North Branch projects had been approved ("Phase Two"), and Armco/Allegheny appealed that issue and the time for calculation ("Phase One") issue for all contracts. Commonwealth Court affirmed the PUC's modification of the contracts (Phase Two), but remanded the cases for updating of calculations to the time of contract signing (Phase One).[2] 299a-320a, *"Burgettstown I"*.[3] Thus, Armco/Allegheny won one issue, convincing the Court that the date of contract signing should be the date for "avoided cost" calculation, and all petitioners lost on the issue of contract modification. The Pennsylvania Supreme Court did

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[1]A "recommended decision," under Pennsylvania statutory law, is one that does not become a final PUC decision until it is affirmatively acted upon, i.e., it is "advisory" only, until the agency acts on the matter. 66 Pa. C.S. §331 and 335.

[2]Although the cases were argued together, and all came from the same PUC order, different orders were issued by Commonwealth Court.

[3]Although the developer is North Branch, the case references use the name of the project site i.e., "Burgettstown", and are numbered chronologically by Commonwealth Court order date.

not accept *Burgettstown I* for review, but did accept appeals concerning the companion Milesburg project.[4]

The PUC, on remand of the Phase One decision concerning North Branch, approved recalculations as of the date of contract signing (for which petitioners Armco/Allegheny had argued). All petitioners submitted calculations *as of October 15, 1987* (the date of contract signing), and did not claim that was an improper date. Petitioners in the remand argued for the first time that West Penn had "zero" capacity need on the date it signed the contract to buy North Branch capacity. The PUC found such arguments totally lacking credibility. 32a-36a. Petitioners appealed again, on the basis that the recalculations were incorrect, and Commonwealth Court affirmed the PUC decision. *Armco Advanced Materials Corp. v. Pennsylvania Public Utility Commission,* 157 Pa. Commonwealth Ct. 150, 629 A.2d 221 (1993) *(Burgettstown II).* The Pennsylvania Supreme Court refused to review that decision. Nos. 462, 457, 577 and 596 W.D. Allocatur Docket 1993 (April 4, 1994). Absent from the Commonwealth Court's opinion in *Burgettstown II* is a discussion of any point related to petitioners' claims here. This is because petitioners raised no such issue before the PUC or Commonwealth Court in *Burgettstown II;* all their claims here relate solely to the decision in *Burgettstown I.*

JURISDICTION

There is no basis for jurisdiction in the Supreme Court of the United States under 28 U.S.C. §1257. Statutory validity is not here at issue, and petitioners have not claimed a "title, right, privilege or immunity", under 16 U.S.C. §824a-3, the only statute in issue. Further, petitioners' claims are

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[4]This culminated in affirmance of the Commonwealth Court decision. *Armco Advanced Materials Corp. v. Pennsylvania Public Utility Commission,* 135 Pa. Commonwealth Ct. 15, 579 A.2d 1337 (1990) *aff'd,* _____ Pa. _____, 634 A.2d 207 (1993), *(Milesburg II) petition for cert. filed* No. 93-1341 (February 22, 1994).

untimely. The relevant judgment was that of the Pennsylvania Commonwealth Court, which became final as of February 3, 1992, (the date the Pennsylvania Supreme Court denied reconsideration), and petitioners neither sought review by this Honorable Court then, nor attempted to preserve contract modification issues in the remand on the other issue of timing of avoided cost calculation.

STATEMENT OF THE CASE

This statement is intended to correct the statement of the case set forth in the Petition for Certiorari.

A. Introduction and Legal Background.

This case concerns the express statutory requirement that utilities make purchases from independent power producers, under PURPA §210, 16 U.S.C. §824 a-3. PURPA §210 required that FERC promulgate rules concerning sales by independent power producers (known as "qualifying facilities"), and requires implementation of the FERC rules by state regulatory agencies. The state regulatory agency thus became a surrogate for FERC in regulating these transactions. FERC required utility payments to equal avoided cost, which is the "full avoided cost" requirement.[5] Payments equal to avoided costs are just and reasonable and in the public interest. 18 C.F.R. §292.304(a)(1) and (b)(2).[6]

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[5]The FERC rules (regulations) could not provide for rates in excess of the utility's incremental cost for alternative electric energy. 16 U.S.C. §824 a-3(d). At 18 C.F.R. §292.101(b)(6), FERC defined "avoided costs" as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility . . . such utility would generate itself or purchase from another source."

[6]Even if contract rates are higher than actual avoided costs at time of power delivery (18 C.F.R. §292.304(b)(5)), a qualifying facility which has obtained the "certainty of an arrangement" may not be "deprived of the benefits of its commitment as a result of changed circumstances." 45 *Fed. Reg.* 12224 (Feb. 25, 1980).

Contrary to petitioners' assertion, the FERC regulation at 18 C.F.R. §292.301(b) does not *encourage* but rather *allows* a qualifying facility to agree to rates, terms or other conditions differing from those which otherwise could be required in the regulations. Thus the regulations are not mandatory, if the qualifying facility in an agreement chooses to relinquish specific benefits.[7] The regulations do not state that such a contract is outside the scope of FERC and derivative PUC jurisdiction nor does anything indicate that intent. FERC did not establish two completely separate classes of contracts, which it easily could have done.

The disputed authority exercised by the PUC concerning the contract here simply allowed a qualifying facility the benefits of the contract it signed. The PUC held that contract "milestones" or due dates being jeopardized by litigation delays should not cause the termination of North Branch's right to sell power under terms it agreed to (275a-276a), since it had done everything it could to enter into a legally enforceable obligation, at the latest on the date of contract signing (October 15, 1987).[8] Armco/Allegheny first sought to have the PUC reject or modify the contract, claiming the "voluntary" terms were unlawful, until the milestone dates could not be met; then Armco/Allegheny and West Penn claimed the "voluntary" milestone dates could not be extended under the PUC's PURPA authority.[9]

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[7]FERC expressly recognized this in its Preamble, 45 *Fed. Reg.* 12217 (February 25, 1980), indicating that 18 C.F.R. §§292.301-308 did not preclude agreements with different terms and that such agreements "do not violate the Commission's rules under section 210 of PURPA."

[8]The PUC consistently agreed with the position, originally proposed by West Penn, that avoided costs calculated *prior* to contract signing do not violate 18 C.F.R. §292.304(d)(2). However, in *Milesburg II* and *Burgettstown I* the Commonwealth Court agreed with petitioners Armco/Allegheny and held that §292.304(d)(2) means rates must be recalculated as of the contract signing date, and the Pennsylvania Supreme Court was evenly divided on whether to reverse on that point.

[9]"Voluntary" is a reference to petitioners' terminology—the FERC regulations do not define contracts as "voluntary" or "involuntary."

North Branch could not meet the due dates or on-line dates in the original contract solely due to litigation. 275a-276a. Since the PUC had PURPA authority to require a contract with milestone dates, it exercised the same authority to maintain the status quo by directing use of new milestone dates to reflect litigation delays. 287a-288a. This result was upheld by the Commonwealth Court in *Burgettstown I.*

West Penn negotiated and agreed to the rate but petitioners say the extension of milestone dates somehow made the originally reasonable rate, calculated by West Penn, become unreasonable. Petitioners argue that rates exceed avoided costs, based on the contention that avoided costs should be *zero,* i.e., based on West Penn having *no* capacity need (31a), a claim rejected by the PUC. 31a-36a. Rates can only be "far in excess of avoided costs" if West Penn has found a source of electric generation that costs *nothing* to build. Their claims of a "windfall" also presume North Branch will incur no cost to build the plant, and that the capacity would have no value, neither of which is true—even if West Penn did not need baseload capacity it would still have a value. Moreover, West Penn does need capacity. Even West Penn's required filings with the PUC in 1987 through 1989 specifically indicate the North Branch capacity was part of the way West Penn would meet capacity needs. 32a-33a.

Petitioners now for the first time argue that the time of North Branch incurring a "legally enforceable obligation," under 18 C.F.R. §292.304(d)(2), equals the date of the PUC order approving the contract modifications, a date unrelated to North Branch's obligation. Contrary to the misstatement by petitioners (Pet., p.6) Armco/Allegheny never argued for a calculation date other than October 15, 1987, the date of contract execution. Petitioner West Penn entered the contract and first asserted that its calculation date *prior* to signing the contract was correct. 151a-154a. However, West Penn objected to the PUC directing contract extensions. West Penn subsequently objected to the PUC's

use of the original 1986 calculation date, but did not suggest any alternative date.[10]

Armco/Allegheny argued PURPA required recalculating avoided costs as of the date of contract signing, in proceedings before the PUC (152a) and pursued that argument on appeal. Commonwealth Court accepted that principle. *Burgettstown I,* 305a-307a. Armco/Allegheny never deviated from that argument in any Burgettstown proceedings.[11]

The petitioners misrepresent the holding in Commonwealth Court's review of the PUC's decisions in both Burgettstown cases. In neither case did the Commonwealth Court "reject" a contention that rates should be calculated as of September 29, 1989, the date of the modification order, because nobody made that argument.

B. The Agreement and the PUC Proceedings.

Whether North Branch can sell power to West Penn has been before the PUC and appellate courts for over six years. At West Penn and Armco/Allegheny's insistence North Branch has had its contract with West Penn reviewed twice by the PUC and twice by the Pennsylvania Commonwealth Court.

On January 5, 1988 West Penn filed a petition with the PUC seeking approval of its agreement with North Branch as conforming to PURPA §210, and approval to collect from ratepayers the amounts West Penn would pay for purchases of energy and capacity. West Penn calls such an agreement an Electric Energy Purchase Agreement or "EEPA." As with previous petitions, the PUC treated this as a petition for a declaratory order that the utility's agreement did not violate PURPA or state law and that the payments

[10]The question of using West Penn's original 1986 calculation date became moot when Commonwealth Court accepted Armco/Allegheny's contract execution date (October 15, 1987) in *Burgettstown I* and the Pennsylvania Supreme Court declined to review that case."

[11]They did make arguments for different dates to the Pennsylvania Supreme Court in *Milesburg II.*

were at or below avoided costs. An order granting the West Penn petition and approving the North Branch EEPA was entered on July 8, 1988. 95a-96a.

Subsequently, Commonwealth Court issued a decision *(Milesburg I)* holding, at Armco/Allegheny's urging, that utility customers should have an opportunity for a hearing concerning capacity payments for another West Penn contract. Armco/Allegheny wanted hearings so contracts could be modified if payments exceeded avoided costs. West Penn also appealed, claiming there should be ratepayer notice. The Court remanded the Milesburg proceeding with directions (1) that West Penn notify all customers about the contract filing by individual notices and (2) that the PUC hold hearings on the contract. Consolidated hearings were held on the North Branch contract and contracts of three other projects. 97a- 104a. Various petitions for extension of the milestone dates, responses thereto, and ALJ and PUC orders led to a procedural quagmire, prior to and during the evidentiary hearings. 126a-130a.

There were two weeks of hearings in the consolidated proceeding, April 3 through April 12, 1989, with twenty witnesses, twenty-eight statements and 162 exhibits admitted into the record. (129a). The ALJ's recommended decision of June 8, 1989, consisted of two sections, "Phase One" and "Phase Two". 117a-118a. Phase One of the decision held that West Penn's formula for calculating the various payments for capacity under consideration was reasonable, and that the various capacity payments were at or below West Penn's costs for capacity it would build itself, determined by either West Penn's formula or the PUC's regulations. Thus under PURPA the rates were reasonable. 142a-200a. The ALJ found that West Penn needed capacity (158a-173a) and that the three 300 MW coal units proposed to meet APS' need were appropriate.[12] 179a-180a.

[12]West Penn is a part of the Allegheny Power System (APS). Generation needs are planned by APS and ownership of plant and operation are assigned to the member operating companies like West Penn. West Penn

(footnote continued on next page)

The ALJ also found that the timeframe for fixing the calculations was reasonable. 151a-157a. Armco/Allegheny were the only parties to file an exception on this point, arguing as they had done to the ALJ that under PURPA the date of contract execution was the date of the "legally enforceable obligation," thus it was a proper timeframe for fixing avoided costs and the contract price. 246a.

In Phase Two, the ALJ rejected North Branch's request for contract extensions. The final PUC opinion and order entered September 29, 1989 adopted Phase One of the ALJ's decision, but reversed Phase Two on the basis of PURPA authority over qualifying facility/utility relationships. 239a-289a. The order held that West Penn was obligated under PURPA §210 to purchase North Branch's power at rates in the contract. With respect to Phase Two, the PUC extended the Burgettstown contract due dates. 272a-276a, 287a- 288a.

C. The Pennsylvania Commonwealth Court Decision *(Burgettstown I).*

Armco/Allegheny on appeal again argued the rate calculation should have been made on the date of contract signing, October 15, 1987. West Penn appealed the milestone date and in-service date changes approved by the PUC, but did not appeal the Phase One issue of whether avoided cost could be calculated prior to contract signing, since it was West Penn itself which had done that. The Phase One issue as to the date for calculation thus is not properly a subject of this petition for certiorari, since its sole proponents, Armco/Allegheny, *won* the issue in Commonwealth Court

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typically files *APS generation planning information* with the PUC, and consistently used a 900 MW coal installation to calculate payments by *West Penn* to qualifying facilities. Of course no one contends West Penn needed all 900 MW by itself, contrary to petitioners' assertion in its reply memorandum in the Shannopin case (No. 93-1535). Reply memorandum, p. 7. However, the PUC, the courts and West Penn itself usually refer to a West Penn 900 MW facility as a shorthand reference.

and the Pennsylvania Supreme Court declined to accept the *PUC's* appeal of that issue.

The Commonwealth Court affirmed the PUC's direction that the contract modifications be made for North Branch, holding the PUC action was an appropriate exercise of its PURPA authority to implement that statute. *Burgettstown I.* However, the Court reversed the PUC's Phase One determination and directed that the calculations (of avoided costs) be done as of the date of contract execution. 305a-307a, 315a-318a.

In addressing the modification issue, the Court held that when a utility conditions a contract upon PUC approval "and submits the contract (to the PUC) to obtain such approval, the situation is not the private negotiation and agreement contemplated by §292.301(b)." *Burgettstown I,* 309a-310a. As the Court held in another case, the PUC's review of such a petition (and milestone extension) is proper under the §292.401 grant of authority to take "any other action reasonably designed to implement (the FERC regulations)." *Milesburg II,* 135 Pa. Commonwealth Ct. at 21a-22a, 579 A.2d at 1340a-1341a. In other words, the Court found that the PUC necessarily had jurisdiction over the contract under PURPA. Virtually all the parties, including West Penn and Armco/Allegheny, urged the Court to find the PUC had some PURPA authority over the contract, although they now contend otherwise.

The Court had held in *Milesburg II* that the West Penn submittal of the contract for PUC approval invoked "the full power and duty of the PUC to examine all of the contract's terms . . ." under PURPA and the FERC regulations. 135 Pa. Commonwealth Ct. at 37, 579 A.2d at 1348. The Court there recognized that the PUC had PURPA authority to make a contract, different from state law-derived authority, so it could exercise that PURPA authority to extend milestones.

Petitioners sought review of the Phase II issue of PUC authority to modify the contract by extending the milestones in the Pennsylvania Supreme Court. The PUC sought review of the Phase I issue, contending that the

FERC regulations did not *mandate* that avoided cost calculations in a contract be *recalculated* as of the contract signing date. The Pennsylvania Supreme Court declined to review the decision (No. 531 W.D. Allocatur Docket 1990, November 19, 1991) (321a) and denied petitions for reconsideration filed by West Penn and the PUC, on February 3, 1992. 322a. Therefore, the decision became final on that date, Commonwealth Court's decision that the PUC could modify the contract became the "law of the case" in *Burgettstown I,* and the issue of contract modification authority could not thereafter be challenged (except by petition for certiorari filed by May 5, 1992), regardless of the result in *Milesburg II.*

D. The Pennsylvania Supreme Court Decision in *Milesburg II.*

West Penn and Armco/Allegheny challenged the lower court's *Milesburg II* holding that the PUC had PURPA authority to modify a contract. The PUC appealed the Phase One part of the decision, arguing that 18 C.F.R. §292.304(d)(2) does not restrict avoided cost calculations to the date of contract signing, as the lower court had held, but rather that prices agreed to prior to contract signing (as North Branch and West Penn did here) do not violate §292.304(d)(2), i.e., that the regulation was not exclusionary. The opinion describes why the PUC should have the discretion to determine the calculation date, but the Supreme Court split evenly on that question, so the "time of contract signing" remains the law in Pennsylvania. *Milesburg II,* 634 A.2d 207, 208. However, the Court *unanimously affirmed* the PUC's authority to change the milestone dates, as had the lower court.

E. *Burgettstown II.*

In the proceedings on remand, the PUC directed the parties to submit recalculations accounting for changes, if any, which had occurred between the original calculation date and October 15, 1987. The PUC accepted the calculations

submitted by North Branch as appropriately recalculating the purchase price. On remand, West Penn had contended that it had no need for generating capacity on the date it signed the contract with North Branch, a position endorsed by Armco/Allegheny.[13]

West Penn and Armco/Allegheny appealed the PUC's decision on remand. Their arguments on appeal were that the PUC erred by not accepting their claim as to the proper recalculation amount (i.e., that the rate should be "zero"). Commonwealth Court rejected the West Penn and Armco/Allegheny arguments, holding the PUC had properly implemented the original Commonwealth Court order on remand. West Penn and Armco/Allegheny then sought review by the Pennsylvania Supreme Court. The matter before the Pennsylvania Supreme Court thus involved the extremely narrow question of whether Commonwealth Court correctly determined that the PUC on remand had properly implemented the Commonwealth Court's prior decision. In *Burgettstown II* there were extremely limited, non- recurring issues relevant only to one contract, and the Commonwealth Court was clearly correct in affirming PUC. Thus the Pennsylvania Supreme Court refused to accept the case for review. Nos. 457, 462, 577 and 596 W.D. Allocatur Docket 1993 (April 4, 1994).

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[13]Amazingly, petitioners assert (footnote 8, pet. p. 17) that an argument *contrary* to the Armco/Allegheny argument in *Burgettstown I*, which petitioners asserted for the first time before the Pennsylvania Supreme Court *in another case (Milesburg II)* (that a "legally enforceable obligation" did not occur on the date of contract signing but rather occurred on the final order date), was *preserved* in argument on remand in *Burgettstown II*. It is not possible to preserve an argument made in another case, but petitioners did not attempt it anyway—the closest thing thereto was a general statement that West Penn "maintains its opposition to those opinions" (referring to matters then pending before the Pennsylvania Supreme Court) and "reserves the right to amend this petition." Petition for allowance of appeal to the Pennsylvania Supreme Court in *Burgettstown II*, pp. 14-15.

REASONS FOR DENYING THE WRIT

The Petition for Certiorari is bereft of any indication that there may be "special and important reasons" for granting certiorari. This is a case the Pennsylvania Supreme Court declined to accept for review in 1991. Petitioners failed to petition for certiorari then and failed even to attempt preservation of any claims relating to those they now assert. The PUC proceeding on remand implemented the issue Armco/Allegheny won. At no time in that proceeding or during appeals therefrom did petitioners assert that the prior court decision was erroneous, thus they are time-barred from now making such assertions.

Even though their petition must fail as being untimely, no other valid reasons for granting certiorari exist. Although the factual and procedural history of the case is nightmarish, confusing even to the participants, the aspect of the case petitioners would have reviewed here is the mundane act of extending contract milestone dates and payment schedules. While petitioners have attempted to show confusion among states and important questions of law where none exist, the picture they paint ultimately shows no more than their dissatisfaction with federal law, and the way it was applied in Pennsylvania. West Penn and Armco/Allegheny ultimately want this Court to substitute its judgment on the facts for that of the PUC and Pennsylvania Commonwealth Court.

The Court decided no "federal question" which conflicts with other courts. The statute in question (PURPA §210) is inapplicable to Armco/Allegheny; it is North Branch upon which the statute confers benefits, and it has not sought certiorari. The Pennsylvania Commonwealth Court decided the case on the law and facts of extremely limited circumstances concerning modification of the contract.

Even had petitioners established that there were a federal question presented, and established that results achieved in other states were different (they have not), there would be no conflict with PURPA or the FERC regulations. The FERC regulations are specifically intended to allow the states flexibility in implementing the regula-

tions, 18 C.F.R. §292.401-403, as this Court recognized in *FERC v. Mississippi,* 456 U.S. 742 (1982), not to insure uniformity in implementation. The FERC regulations require that state action be consistent with PURPA and the FERC regulations but the state regulatory agency can issue regulations and take "any other action reasonably designed to implement (the FERC regulations)." 18 C.F.R. §292.401(a).

Any review of the Pennsylvania intermediate court decision here would be limited to the facts of implementation of the FERC regulations in Pennsylvania. Unless this Court were to decide that state PUCs have no authority to modify contracts, or were to invalidate the FERC regulations or their delegation of authority to state PUC's (which petitioners have not asked the Court to do), any decision on the merits would not affect specific implementation in other states; that is up to FERC to change.

There is no national issue presented that requires this Court's attention. Contrary to petitioners' statement, neither the PUC nor Commonwealth Court suggested the PUC is free to modify a contract "in any manner" to ensure success of the qualifying facility. (Pet., p. 20). Rather, the Court held that where the PUC identifies contractual terms in conflict with PURPA or the FERC regulations, the PUC has PURPA authority to modify such terms. *Burgettstown I,* 310a. Thus neither the Court nor the PUC envision the PUC being able to "freely modify" contract terms—this is a much smaller scope of authority than petitioners claim. Armco/Allegheny and West Penn are seeking help in avoiding PURPA requirements, not compliance therewith. North Branch has borne all the risk so far, and has not received a penny for its trouble. It is the petitioners who would terminate this "voluntary" contract, and the PUC which would continue it. The PUC simply held North Branch was entitled to a contract it already had, since it committed to a legally enforceable obligation no later than when it signed the contract. Allowing a contract to this cogeneration plant is hardly a question of national importance.

The results in *Milesburg II* and *Burgettstown I* have diminished in importance even to PURPA implementation in Pennsylvania. Since it is now known that contracts will be examined as of the execution date, and that *Milesburg I* allows hearings, milestone and on-line date provisions in contracts should take these factors into consideration. That could not have happened here, since *Milesburg I* had not been decided when these cases began and there had been no prior evidentiary hearings for any contract.

Even were the unanimous decisions of the Pennsylvania appellate courts wrong, that alone would not justify certiorari. *Ross v. Moffitt,* 417 U.S. 600 (1974). Whether this Court might decide a case differently is not a sufficient reason for granting certiorari. *Watt v. Alaska,* 451 U.S. 259, 275 (1981). The petitioners present no meritorious issues to be reviewed, or even a set of consistent positions; indeed, they did not argue for calculation of avoided costs for North Branch as of the PUC order date of September 29, 1989, until they filed this petition for certiorari. However, they now argue for an unworkable date for calculation of payments under PURPA (the date of a final order months after evidentiary hearings considering the payments) and argue there is a lack of authority for a PUC to extend milestone dates.

Petitioners must establish something more than a "wrong decision" to demonstrate why certiorari should be granted. In *Idaho Dept. of Employment v. Smith,* 434 U.S. 100, 104 (1977), Justice Stevens contended that, even where there was a clear error in the Idaho Supreme Court's decision, since there also was no question of national importance, certiorari was unwarranted. There was no error here and no question of national importance. PURPA clearly delegated to FERC the responsibility to formulate a national scheme for regulation of qualifying facilities' relationships with utilities. FERC's regulations in turn provide specific parameters, but leave discretion to the states in implementation, which is also quite clear. No question of PUC action consistent with those parameters, but undertaken within the area of flexibility, can be considered a federal question of importance.

Alleging conflicts where none exist, referring to dollar amounts not in issue, taking inconsistent positions and asserting only vaguely why this Court should review this case, petitioners have failed to show any reasons for granting certiorari.

I. PETITIONERS FAILED TO SEEK TIMELY REVIEW OF THE FINAL DECISION ON CONTRACT MODIFICATION AND HAVE FAILED EVEN TO ATTEMPT PRESERVATION OF ANY SUCH ISSUES.

Review of the issue raised by petitioners would be improper at this late stage. Whether the PUC can modify the contract here was decided by an appellate court long ago. The Pennsylvania Supreme Court declined review of that case in 1991. Rather than petitioning for certiorari on the issue of PUC authority to modify contracts after the Court denied review, petitioners returned to the PUC's forum for a recalculation of avoided costs. The modification issue was decided with finality once the Court denied review. At that point, the modification ruling became the law of the case.

The petitioners acknowledge the relevance of two decisions ascribing finality to a state supreme court decision sufficient for a petition for certiorari to be brought. In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975) *(Cox)* this Court detailed four categories of cases in which the highest state court decision could be reviewed by this Court, notwithstanding state court remands for further proceedings. *Burgettstown I* qualifies in several categories, as a decision where the federal issue is conclusively determined and as one where later review of the federal issue[14] cannot be had. In *Duquesne Light Co. v. Barasch,* 488 U.S. 299 (1989), in accord with Cox, this Court found the Pennsylvania Supreme Court decision sufficiently final to

[14]The PUC does *not* contend there is a "federal issue," but petitioners should have earlier sought review of any potential issue.

warrant certiorari, notwithstanding a remand to the PUC. These cases squarely fit the *Burgettstown I* scenario as well, thus we submit clearly warrant petitioners having sought certiorari in 1992.

By not petitioning for certiorari on the issue of PUC authority to modify power purchase agreements after the denial of appeal in *Burgettstown I,* petitioners tacitly acquiesced to the ruling. After pursuing appeals of the recalculation order in which no contract modification issues were raised or discussed, petitioners now seek review of the Commonwealth Court's 1990 determination of PUC authority. Such review is impermissible under Pennsylvania case law and the case law of this Court.

Procedurally, this matter is similar to the Pennsylvania Superior Court case *Singleton v. Waties,* 420 Pa. Super. Ct. 184, 616 A.2d 644 (1992). There, the trial court ordered child support payments and determined who could claim the income tax deduction. On appeal there was no objection to the income tax deduction determination. The matter was remanded and the trial court again ordered support payments. A second appeal alleged trial court error in refusing to reconsider the question of income tax deduction for the child. The Superior Court held that "[b]ecause . . . this matter was resolved [during the first trial], it was not an appropriate question to be decided by the trial court and is certainly not a matter available for our review." *Id.* at 648.

In Pennsylvania, petitioners are barred from raising issues conclusively decided in a prior appeal. Each appellate court in Pennsylvania has held that issues decided on a prior appeal between the same parties become the *law of the case* and will not be reviewed in subsequent appeals.

The Pennsylvania Superior Court has held that the "law of the case" doctrine prohibits appellate courts from revisiting issues that have been decided in an earlier appeal in the same case between the same parties. *Benson v. Benson,* 425 Pa. Superior Ct. 215, 624 A.2d 644 (1993), *appeal denied,* 639 A.2d 22 (Pa. 1994). *See also: Spang & Co. v.*

USX Corp., 410 Pa. Superior Ct. 254, 599 A.2d 978, *appeal denied* 611 A.2d 712 (Pa. 1991) (Decision by appellate court on prior appeal becomes *res judicata*, the law of the case, and is unamenable to further review).

The Commonwealth Court agrees. In *Hughes v. Pennsylvania State Police*, 152 Pa. Commw. Ct. 409, 619 A.2d 390 (1992), *appeal denied*, 637 A.2d 293 (1993), the court held that the doctrine of "law of the case" provides that where an appellate court has ruled on a question, the court will not normally reverse the previous ruling in a subsequent appeal of another phase of the case.

The Pennsylvania Supreme Court has held "[i]t is hornbook law that issues decided by an appellate court on a prior appeal between the same parties become the law of the case and will not be reconsidered on a second appeal." *Commonwealth v. Tick, Inc.*, 431 Pa. 420, 246 A.2d 424, 427 (1968). The Pennsylvania Supreme Court would not review the Superior Court's decision made in the first appeal, stating that the lower court's determination that a belt conveyor was "improvement to real property" within the meaning of the statute was the law of the case and would not be reconsidered in a second appeal. *McCormick v. Columbus Conveyer Co.*, 522 Pa. 520, 564 A.2d 907 (1989). Thus, the "law of the case" doctrine required that petitioners petition for certiorari after *Burgettstown I* became final.

Further, petitioners are precluded from raising the modification issue, because they failed even to attempt to preserve this issue on remand. Petitioners, while objecting to the modifications before the PUC, the Commonwealth Court and in the attempted appeal to the Pennsylvania Supreme Court, abandoned their argument after the matter was remanded. They did not raise the modification issue during the *Burgettstown II* recalculation proceeding, nor in that appeal to the Commonwealth Court, nor in that petition for review filed with the Pennsylvania Supreme Court. Petitioners chose to omit or abandon this argument even though federal and Pennsylvania case law forcefully and consistently have held that issues not preserved are waived.

This Court has stated "[w]e ordinarily will not decide questions not raised or litigated in the lower courts." *California v. Taylor,* 353 U.S. 553, 556, n. 2 (1957). Even where an issue was litigated below, this Court required preservation of the issue in order to grant review. *City of Springfield v. Kibbe,* 480 U.S. 257, *reh'g denied,* 481 U.S. 1033 (1987) (Issue was waived because petitioner failed to object to a jury instruction before the Court of Appeals and failed to make an argument for a higher standard than gross negligence.) In *Smith v. Murray,* 477 U.S. 527 (1986), the petitioner objected to admission of testimony at trial but then failed to pursue that claim before the Supreme Court of Virginia, thus waiving further objection. *Id.* at 534.

This Court has determined that so long as there is a state procedural requirement that issues must be preserved, there exists an independent and adequate state procedural ground sufficient to disallow direct review. *See, Wainwright v. Sykes,* 433 U.S. 72, 86-87, *reh'g denied* 434 U.S. 880 (1977) *(Sykes)* (Because Florida procedure required that confessions be challenged at trial or not at all, respondent's failure to timely object to its admission prevented review).

The Pennsylvania Rules of Appellate Procedure expressly state that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa. R.A.P. 302(a). Likewise, issues not raised on appeal are waived. Pennsylvania case law supports these rules. *See e.g.: Robinson v. Robinson,* 505 Pa. 226, 478 A.2d 800 (1984) (issues not raised on appeal were waived); *Lower Paxton Township, Board of Supervisors v. Okonieski,* 153 Pa. Commw. Ct. 36, 620 A.2d 602 (1993) (Issue waived due to failure to raise issue below or in statement of matters complained of on appeal); *Ibn-Sadiika v. Riester,* 380 Pa. Super. Ct. 397, 551 A.2d 1112 (1988) (Plaintiff whose brief on appeal contained no argument in support of any theory of recovery had waived those claims).

Therefore, although petitioners did not attempt to raise modification issues in the second appeal before the PUC or

the courts, had they done so, such an appeal would have been denied by Pennsylvania courts (1) due to *res judicata* and (2) due to failure to preserve issues at hearing. Thus an "independent and adequate" state ground would exist to support the *Burgettstown I* decision, under *Sykes, supra,* which would result in denial of certiorari. Since the contract modification determination long ago became the "law of the case," petitioners may not now have their petition granted.[15]

II. BECAUSE THE FERC REGULATIONS ALLOW FLEXIBILITY TO THE STATES TO IMPLEMENT THOSE REGULATIONS, COMMONWEALTH COURT CORRECTLY AFFIRMED THE PUC'S DECISION ON CONTRACT MILESTONE DATES AND PAYMENT UPDATES, THUS THERE IS NO QUESTION WORTHY OF THIS COURT'S EXERCISE OF JURISDICTION.

Although petitioners note that §292.301(b) of the FERC regulations provides that agreements with terms differing from the regulations are permissible, they misunderstand the meaning of §292.301(b). FERC explained in its Preamble:

> Some commenters indicated that §292.301(b)(1) might be interpreted as prohibiting a State from reviewing contracts for purchases.
>
> * * * *
>
> These rules, and the exemptions being provided by these rules, are not intended to divest a State regulatory agency of its authority under State law to review contracts for purchases as part of its regulation of

[15]Although other respondents contended Pennsylvania decisions were not final in *Milesburg II* and *Shannopin II*, the PUC disagrees. However, in *Milesburg II* petitioners *could* seek to assert preservation of the issue on remand, although the PUC believes the "law of the case" is now established there. Regardless, petitioners did timely file a petition for certiorari there.

> electric utilities. Such authority may continue to be exercised if consistent with the terms, policies and practices under sections 210 and 201 of PURPA and this Commission's implementing regulations. If the authority or its exercise is in conflict with these sections of PURPA or the Commission's regulations thereunder, the State must yield to the Federal requirements. The Commission does not believe it possible or advisable to attempt to establish more precise guidelines than these.

Preamble, 45 *Fed. Reg.* 12,233 (February 25, 1980).

Neither the Pennsylvania courts nor the PUC have suggested the PUC could exercise unfettered discretion under PURPA to modify contracts submitted to it. What the PUC does say, and the Pennsylvania Commonwealth Court has adopted as a proper exercise of the PUC's mandate and authority under PURPA, is that the PUC may act sparingly to approve contract modifications, particularly those preserving the contract, to the extent they are consistent and in accord with what the PUC could have directed the qualifying facility and utility to do in the first place. Since the PUC's authority emanates from PURPA and the FERC regulations, the PUC could not modify a contract to be contrary to the requirements of those regulations. Thus while the PUC cannot require a qualifying facility to waive a PURPA right, it may approve a contract where a qualifying facility waives rights (18 C.F.R. §292.301) or it may determine qualifying facilities have specific PURPA rights.

The PUC is certainly empowered to approve contract provisions setting out milestone dates tied to and contingent upon finality of the proceeding. Petitioners ignore the fact that they are the reason the North Branch milestone dates have not yet occurred—since the milestones are pegged to finality of these proceedings, pointless pursuit from one tribunal to the next has caused the delay. Further, petitioners constantly repeat their theme that "avoided costs were reduced," but this is based on the thoroughly discredited notion that West Penn's need for capacity com-

pletely disappeared. The PUC approved contract calculations pursuant to West Penn's methodology and found that rates under the West Penn formula, by which rates changed according to the particular qualifying facility on-line date, were below full avoided costs, since the formula discounted payments. There was no aberrant exercise of PUC authority; no act inconsistent with PURPA; no approval by Pennsylvania courts of acts exceeding PURPA; and, no conflict with a decision of courts in any other state.

The mandate to implement the FERC regulations means that PURPA authorizes the PUC to exercise jurisdiction over qualifying facility/utility relationships to insure compliance with PURPA, i.e., to insure utilities bargain fairly with qualifying facilities. Since the PUC can direct the entry of contracts, it is absurd to say it cannot approve changes to contracts presented to it when necessary to carry out the purpose of PURPA, while preserving the essential elements of the bargain reached; such a view would discourage qualifying facilities from entering voluntary agreements.

Nothing indicates there is a federal policy "favoring free negotiation of long term contracts" — utilities did not sign such contracts prior to PURPA — so the PUC and Pennsylvania Courts could not have affected a non-existent "policy". Further, the PUC has wholeheartedly endorsed milestone dates, but recognized in the unforeseen circumstances of this case, that failure to extend such dates would be completely inequitable.

Petitioners have cited cases from other states as ostensibly conflicting with the decision here. This is not so. Petitioners first cite *Public Utility Commission of Texas v. Gulf States Utilities Co.*, 809 S.W.2d 201 (Tex. 1991) *(Gulf States)*. In that case, the contract payments exceeded the utility's avoided cost. The Texas Commission held the utility could not contract for payments above avoided cost. The Commission had promulgated its own "PURPA regulations." One regulation stated rates could not exceed avoided costs, while another allowed contracts to deviate from the regulations in rates and other terms. The Texas Su-

preme Court held the avoided cost "ceiling" only applied when the Commission *ordered* a utility to enter a contract; when, on the other hand, the utility and qualifying facility *voluntarily* agreed on the rate provisions, the Commission had to respect the regulation allowing voluntary deviance from the rates under the regulations. However, the Commission could determine whether payments above full avoided cost ultimately would be recoverable, but could not *automatically* disallow recovery—the utility would have the opportunity to establish that such payments were reasonable. Applying *Gulf States* to this case would have meant Armco/Allegheny could not litigate the rate level in the first place, since that holding prohibited inquiring into the rate provisions of voluntary contracts, and no milestone extensions would have been necessary.

This decision is not inconsistent with the decision here. None of the parties to the Texas contract requested modification by the Texas commission. The Texas Supreme Court found invalidation of the contract in conflict with both a Texas regulation and the FERC regulations. In the instant case, North Branch, did request that the PUC extend the milestone dates. Also, the extension of the milestone dates was to *preserve* the contract and did not conflict with state or FERC regulations.

In fact, petitioners' argument that §292.301 precludes extending milestones is disingenuous since Armco/Allegheny argued that the PUC should reduce the *negotiated rate* set out in the original EEPA so that the purchase from North Branch would be *less* than avoided costs. Essential to Armco/Allegheny's request was a presumption that the PUC has authority to change the payment provisions of a contract voluntarily entered into. Of course the contention that payments by the utility should be reduced conflicts with the *Gulf States* holding. Neither the PUC nor North Branch has argued for extension of authority to modify contracts to questionable or controversial lengths—the exercise here was the simple administrative act of preserving the contract by replacing an unworkable set of "milestone dates," the application of which would have *ter-*

minated the North Branch/West Penn agreement (an agreement found to be consistent with and thus required by PURPA), with milestone dates tied to the conclusion of the proceedings.

Petitioners also cite *In Re Vicon Recovery Systems,* 572 A.2d 1355 (Vt. 1990) *(Vicon)* as supporting their position, which it does not. The state commission there disapproved a contract as having rates above avoided cost. The qualifying facility argued that the contract was allowable under the FERC regulations, which in turn preempted state statutory authority. Therefore, the utility commission could only exercise authority pursuant to PURPA, and since the FERC regulations allowed voluntary price agreements, the commission could not disapprove the contract on the basis that payments exceeded avoided costs. The Vermont Supreme Court held there was no preemption of state authority to review contracts, but agreed that 18 C.F.R. §292.301 was the relevant regulation. However, the Court found the regulation did not deprive the commission of authority to approve or disapprove such contracts, citing the FERC regulations Preamble discussion of §292.301 as supporting the right of state commissions to review voluntary contracts.[16] Thus *Vicon* stands for a result opposite to that suggested by petitioners—there, the court upheld disapproval of a voluntary contract on the basis of PUC authority to oversee contracts.

The third case cited by petitioners, *Water Power Co., Inc. v. Pacificorp,* 99 Or. App. 125, 781 P.2d 860 (1989), *review denied,* 309 Or. 291, 787 P.2d 887 (1990), *cert. denied,* 498 U.S. 811 (1990) *(Water Power),* also presents no conflict. Although it had not obtained a required transmission agreement from another utility, the qualifying facility claimed it was entitled to a contract with 1982 rates, rather than lower 1983 rates, since it began negotiations with the purchasing utility in 1982. The Oregon Commission agreed but said the utility could demand a written

[16]See the first paragraph in this section, *supra,* for a recitation of pertinent Preamble language.

transmission plan. No agreement had been reached by the end of 1984, so the Commission gave the qualifying facility an *extension of time,* until November 1, 1985, to obtain the agreement. The parties subsequently signed a power sales agreement, but the qualifying facility did not get a transmission agreement.

In a breach of contract action, the qualifying facility contended the utility had an absolute obligation to buy its power under PURPA, so the utility could not require a transmission agreement, even though the qualifying facility had agreed to that provision. The Oregon court did not excuse the qualifying facility from that provision. This was a completed contract to which the state regulatory commission had given final approval (not one being litigated before it) *and* the commission *had* given the qualifying facility a time extension.

Petitioners also cite *Bates Fabrics, Inc. v. Public Utilities Commission,* 447 A.2d 1211 (Me. 1982) *(Bates).* That case involved a contract entered prior to PURPA which the qualifying facility sought to revise to get avoided cost, rather than the lower contract price. The commission declined to increase the price and the Supreme Court of Maine agreed, noting that FERC comments and regulations indicated there was no intention that pre- PURPA contracts were to be changed. Whether to modify a provision in an ongoing pre-PURPA contract has nothing to do with the instant case.

None of these decisions is inconsistent with the Court's decision that the contract milestones could be extended in the North Branch/West Penn contract. In *Gulf States,* none of the contracting parties sought modification of the terms, but the commission arbitrarily sought to limit cost recovery. In *Water Power,* the Court found it was entirely consistent with PURPA to allow the parties to voluntarily make a bargain requiring an independent transmission agreement, so there could be no breach of contract from the utility insisting upon compliance with that term. The Vermont Court in *Vicon* approved rejection of a voluntary contract,

while the Texas Court reversed rejection of such a contract. However, both cases involved rates that were above avoided costs in the original contracts while in this case rates (and the method of calculating them) were found reasonable and *below* avoided costs. In fact, Pennsylvania had full evidentiary hearings on rates and many other contract circumstances, a process which did not occur in the other states. Finally, the above cases were based on PURPA implementation in individual states, and the FERC regulations permit flexibility to the states in deciding how and when avoided costs should be calculated, so differences among states in that regard do not present a "conflict" to be resolved by this Court.

Astonishingly, Armco/Allegheny, the parties that insisted upon PUC review of the contract in question, that demanded the PUC find the contract price excessive under PURPA, that argued for the application of the FERC rules (18 C.F.R. §292.304(d)(2)) to require recalculation of the contract price on the contract signing date, and that argued PURPA constraints before the Pennsylvania appellate court—knowing all the time the contract was negotiated, rather than mandated by the PUC—now ask this Court to invalidate the contract on the basis that it was "voluntary" under 18 C.F.R. §292.301, and thus it was entirely beyond the power of the PUC, under PURPA, to extend milestone dates in the contract. If accepted, this argument can only mean the PUC should never have reviewed the contract in the first place, and that Armco/Allegheny several times misrepresented that PURPA applied to this case.

West Penn contends the PUC lacked PURPA authority to extend milestones and update the capacity schedule. Yet West Penn agreed the PUC has authority to approve pass-through of the contract rates, and to approve the contract as complying with PURPA. West Penn also asked the PUC to direct publication of the order in the Pennsylvania Bulletin, which could lead to attacks on the contract, so West Penn recognized the PUC's authority to review the contract for consistency with PURPA.

Many qualifying facility/utility contracts are negotiated, at least partially, even under bidding programs. If petitioners' argument, that all such contracts are outside of the FERC regulations, were correct, then state courts could not interpret those regulations as requiring or allowing examination of rates or any other terms of negotiated contracts. This means FERC developed a regulatory plan that would not apply in most situations, and PUC contract review would be unnecessary. Clearly, not even petitioners take this view seriously. Petitioners are really saying that if a utility and qualifying facility sign a contract the PUC can only *reduce* a qualifying facility's benefit by applying the FERC regulations and cannot *allow* benefits under the regulations. This is not the intent of PURPA or the FERC regulations. There is no conflict with other states nor were the PUC or Pennsylvania court in error in interpreting PURPA.

III. THE PUC HELD FULL EVIDENTIARY HEARINGS, DETERMINING THAT RATES UNDER THE CONTRACT WERE BELOW FULL AVOIDED COSTS AND JUST AND REASONABLE. NOTHING IN PURPA OR THE FERC REGULATIONS REQUIRED RECALCULATION OF CONTRACT RATES ON THE DATE OF THE PUC ORDER.

Petitioners have not argued that calculations of avoided costs should be made on the date of the PUC order approving the contract price until they filed this petition. It is a preposterous idea that the date of the PUC order, after the *end* of evidentiary hearings reviewing avoided cost calculations, could be the date on which calculations of avoided costs should be made. Petitioners' current theory seems to be that North Branch had to wait until *after* the end of the evidentiary proceedings before it could be "committed" to a legally enforceable obligation to sell power, since contract milestones were extended. The theory is nonsensical. First, North Branch executed a contract on October 15, 1987, so it clearly "committed" to sell power, at the latest, by that date. Second, there were full evi-

dentiary hearings concerning West Penn's need for capacity, avoided cost pricing, whether the North Branch milestones should be extended, and other factors, all premised on North Branch having committed to sell power. The conclusion was that the price was below full avoided costs, so the decision cannot conflict with decisions from other states finding payments were in *excess* of avoided costs, particularly when there were not evidentiary hearings in those cases, including *Petition of East Georgia Cogeneration*, 158 Vt. 525, 614 A.2d 799 (1992).

In the face of these exhaustive hearings, the petitioners' claim that the PUC gave "no weight" to whether the rates were "just and reasonable" is a clear misstatement. Petitioners' argument that the decision in *Vicon, supra,* stands for the proposition that there is no "legally enforceable obligation" until PUC approval is a clear misapplication of that case, since the Vermont Commission had a *requirement* that parties submit proposed contracts to the Commission at least ninety days before signing, and the Vicon parties signed the contract years before submitting it.

Further, petitioners' contention that the "final order date" should be used would lead to an absurd result. If the PUC examined rates in an evidentiary hearing and decided they exceeded avoided cost when the contract was signed, the contract rates would be reduced. Yet by petitioners' logic, since the contract would be modified, rates would then have to be examined as of the final order date, when avoided costs could well be *higher.* So the PUC would then have to approve rates even higher than the original contract rates, because it found the rates agreed upon by the qualifying facility and the utility too high and modified the contract. Such an event shows why this twisted reasoning can not be accepted.

The timeframe for deciding when a legally enforceable obligation occurs may differ from state to state without violating PURPA. Petitioners attempt to mislead this Court into thinking a substantial sum of money is involved by claiming West Penn had no need for capacity on the date of

the PUC's order on September 29, 1989.[17] No party submitted any testimony during the hearings in April of 1989 indicating that West Penn had no future need for capacity, as of April of 1989. Rather, West Penn testified it had originally planned to build 900 MW of utility-owned, more expensive plant.[18] (173a). Neither the PUC nor the court accepted West Penn's later claim that it needed no capacity when it signed the contract.

There is no reason to believe the PUC erred in exercising its discretion under the FERC regulations. As this Court stated in *Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984):

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. n12.

467 U.S. at 843-844 (footnotes omitted).

In this case, there is both a delegation of statutory authority directly under PURPA and an express delegation under the FERC regulations of authority to state commissions to promulgate regulations (18 C.F.R. §292.401(a)).

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[17]West Penn never did contend in this proceeding that it had "zero" capacity need as of September 1989. In the remand, however, it claimed it had no capacity need as of October 15, 1987 when it signed the contract. In *West Penn Power Co. v. Pennsylvania Public Utility Commission,* 150 Pa. Commonwealth Ct. 349, 615 A.2d 951 (1992) *(Shannopin II),* it claimed it had "zero" capacity need as of August 29, 1991. Thus we are presented with at least three different dates for finding a "zero" capacity need. The PUC found these claims to be absurd and in fact, at least as of November of 1992, many of the *planned* qualifying facility additions would not be completed, thus *increasing* capacity need. 33a-36a.

[18]The ALJ's decision refers to West Penn building the plant, although of course the holding company, APS, could assign ownership amounts to various subsidiaries, and West Penn's "share" would be considerably less than the full 900 MW.

There is also flexibility to determine the methodology for the calculation of avoided capacity payments. (45 *Fed. Reg.* 12226; 18 C.F.R. §292.304(b) and (e)). Thus absent some compelling demonstration of agency wrong-doing, the PUC's decision should not be disturbed.

The parties (Armco/Allegheny) which originally won their contention that rates should be calculated as of contract signing (October 15, 1987) should not now be heard to complain the date should be September 29, 1989 (particularly when no petitioner previously made that claim) so they can drag the proceedings out longer. They would have this Court accept a case in order to reverse a holding two of them argued for, to decide policy questions so that states do not interpret the FERC rules in favor of qualifying facility developers, and to insure this contract does not go forward. This Court has already upheld the FERC regulations, in *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402 (1983); it need not reaffirm that decision, nor provide any "guidance" on whether the date on which North Branch signed the contract is the date for payment calculation, since FERC intended that the states have such flexibility in administering the FERC rules.

CONCLUSION

There is no federal question of any importance, thus the petition for writ of certiorari should be denied.

Respectfully submitted,

Lee E. Morrison